Supreme Court, U.S.
FILED
NOV 3 1992
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No. 91-8199

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS LEE DEAL,

Petitioner,

v.

UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 7, 1992
CERTIORARI GRANTED OCTOBER 5, 1992

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
08/17/90	Indictment in U.S. District Court for the Southern District of Texas, Houston Division filed
09/14/90	Superseding indictment filed
01/22/91	Trial began
01/23/91	Jury verdict of guilty returned
03/28/91	Government's Objections to Presentence Report filed
04/12/91	Defendant's Statement Concerning Presentence Report and Response to Government's Objections to Presentence Report filed
04/12/91	Defendant sentenced (Counts S1-S13) (Cts. S1, S3, S5, S7, S9 & S11—168 mos. to serve as to each count to run concurrently. Ct. S13—120 mos. to serve to run concurrently with sentence in Cts. S1, S3, S5, S7, S9 & S11. Ct. S2—5 yrs. to serve to run consecutively to sentence in Cts. S1, S3, S5, S7, S9 & S11. Cts. S4, S6, S8, S10 & S12—20 yrs. to serve as to each count to run consecutively to each other and consecutively to sentence of all other counts, for a total of 119 yrs. or 1,428 mos. to serve.
04/16/91	Notice of Appeal filed
04/26/91	Judgment and Commitment issued
02/07/92	Opinion of the Court of Appeals for the Fifth Circuit, affirming District Court judgment, issued

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Criminal Number H-90-315-S

UNITED STATES OF AMERICA

v.

THOMAS LEE DEAL

INDICTMENT

[Filed September 14, 1990]

THE GRAND JURY CHARGES THAT:

COUNT ONE

On or about January 24, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, by force and violence and by intimidation, took from the person and presence of Kelly Marie Miller approximately $7,214 cash money belonging to and in the care, custody, control, management, and possession of Ameriway Bank, located at 2900 North Loop West in Houston, Texas, the deposits of which were insured by the Federal Deposit Insurance Corporation, and during the course of committing the aforesaid offense, THOMAS LEE DEAL placed the life of Kelly Marie Miller in jeopardy by the use of a dangerous weapon.

[Violation: Title 18, United States Code, Section 2113(a) and (d)]

COUNT TWO

On or about January 24, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, knowingly and unlawfully carried and used a firearm during the commission of a crime of violence, to wit: the bank robbery described in Count One, for which he may be prosecuted in a court of the United States.

[Violation: Title 18, United States Code, Sections 924(c)]

COUNT THREE

On or about February 23, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, by force and violence and by intimidation, took from the person and presence of Kelly Marie Miller approximately $8,000 cash money belonging to and in the care, custody, control, management, and possession of Ameriway Bank, located at 2900 North Loop West in Houston, Texas, the deposits of which were insured by the Federal Deposit Insurance Corporation.

[Violation: Title 18, United States Code, Section 2113(a)]

COUNT FOUR

On or about February 23, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, knowingly and unlawfully carried a firearm during the commission of a crime of violence, to wit: the bank robbery described in Count Three, for which he may be prosecuted in a court of the United States.

[Violation: Title 18, United States Code, Sections 924(c)]

COUNT FIVE

On or about March 1, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, by force and violence and by intimidation, took from the person and presence of Evelyn Benitez approximately $6,978 cash money belonging to and in the care, custody, control, management, and possession of Charter Bank, located at 2401 Fountainview in Houston, Texas, the deposits of which were insured by the Federal Deposit Insurance Corporation, and during the course of committing the aforesaid offense, THOMAS LEE DEAL placed the life of Evelyn Benitez in jeopardy by the use of a dangerous weapon.

[Violation: Title 18, United States Code, Section 2113(a) and (d)]

COUNT SIX

On or about March 1, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, knowingly and unlawfully carried and used a firearm during the commission of a crime of violence, to wit: the bank robbery described in Count Five, for which he may be prosecuted in a court of the United States.

[Violation: Title 18, United States Code, Sections 924(c)]

COUNT SEVEN

On or about March 5, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, by force and violence and by intimidation, took from the person and presence of Donna Mock approximately $5,916 cash money in the care, custody, control, management, and possession of Charter Bank, located at 5433 Westheimer in Houston, Texas, the deposits of which were insured by the Federal Deposit Insurance Corporation, and during the course of committing the aforesaid offense, THOMAS LEE DEAL placed the life of Donna Mock in jeopardy by the use of a dangerous weapon.

[Violation: Title 18, United States Code, Section 2113(a) and (d)]

COUNT EIGHT

On or about March 5, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, knowingly and unlawfully carried and used a firearm during the commission of a crime of violence to wit: the bank robbery described in Count Seven, for which he may be prosecuted in a court of the United States.

[Violation: Title 18, United States Code, Sections 924(c)]

COUNT NINE

On or about March 13, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, by force and violence and by intimidation, took from the person and presence of Denise Lazeby approximately $17,295 cash money in the care, custody, control, management, and possession of First Texas Bank, located at 755 Post Oak in Houston, Texas, the deposits of which were insured by the Federal Deposit Insurance Corporation, and during the course of committing the aforesaid offense, THOMAS LEE DEAL placed the life of Denise Lazeby in jeopardy by the use of a dangerous weapon.

[Violation: Title 18, United States Code, Section 2113(a) and (d)]

COUNT TEN

On or about March 13, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, knowingly and unlawfully carried and used a fire-

arm during the commission of a crime of violence, to wit: the bank robbery described in Count Nine, for which he may be prosecuted in a court of the United States.

[Violation: Title 18, United States Code, Sections 924(c)]

COUNT ELEVEN

On or about April 12, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, by force and violence and by intimidation, took from the person and presence of Evelyn Benitez approximately $7,037 cash money in the care, custody, control, management, and possession of Charter Bank, located at 2401 Fountainview in Houston, Texas, the deposits of which were insured by the Federal Deposit Insurance Corporation, and during the course of committing the aforesaid offense, THOMAS LEE DEAL placed the life of Evelyn Benitez in jeopardy by the use of a dangerous weapon.

[Violation: Title 18, United States Code, Section 2113 (a) and (d)]

COUNT TWELVE

On or about April 12, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, knowingly and unlawfully carried and used a firearm during the commission of a crime of violence, to wit: the bank robbery described in Count Eleven, for which he may be prosecuted in a court of the United States.

[Violation: Title 18, United States Code, Sections 924(c)]

COUNT THIRTEEN

On or about April 12, 1990, in the Houston Division of the Southern District of Texas, and within the jurisdiction of this court, THOMAS LEE DEAL, defendant herein, previously convicted of conspiracy to commit bank

robbery and bank robbery in United States District Court for the Northern District of Texas on February 20, 1976 and of unlawfully escaping the custody of the Attorney General in United States District Court for the Eastern District of Texas on December 6, 1982, each crime punishable by imprisonment for a term exceeding one year, knowingly possessed two firearms in and affecting commerce, to wit: two guns.

[Violation: Title 18, United States Code, Sections 922(g)]

A TRUE BILL:

/s/ Thelma Moore
Foreperson of the Grand Jury

STEPHEN S. MORRIS
United States Attorney

By: /s/ D. R. Millard III
D. R. MILLARD III
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Caption Omitted in Printing)

GOVERNMENT'S OBJECTIONS TO THE PRESENTENCE REPORT

[Filed March 28, 1991]

TO THE HONORABLE JUDGE OF SAID COURT:

The United States of America, by and through Ronald G. Woods, United States Attorney in and for the Southern District of Texas, makes and files these Objections to the Presentence Report.

I.

First, in the presentence report, the Probation Department does not assess points for a number of the defendant's prior convictions, in calculating his criminal history category, and does not categorize the defendant as a career offender. The United States maintains that points should be assessed for those convictions and that he should be categorized as a career offender under § 4B1.1 of the Sentencing Guidelines, based on the cases of *United States v. Flores*, 875 F.2d 1110 (5th Cir. 1989), *United States v. Metcalf*, 898 F.2d 43 (5th Cir. 1990), *United States v. Paulk*, 917 F.2d 879 (5th Cir. 1990), and Congress' intent as set forth in Title 28, United States Code, Section 994(i).

Thomas Lee Deal was convicted on February 20, 1976 in the United States District Court for the Northern District of Texas, Dallas Division, for five (5) bank robberies: Docket No. *CR-3-75-420*—he received a five

year sentence and a twenty year sentence, to run concurrently, for conspiracy to commit bank robbery and for armed bank robbery committed on September 17, 1974; Docket No. *CR-3-76-025*—pursuant to a Rule 20 transfer, he received three twenty year sentences, to run concurrently to one another and to the sentences just described, for bank robberies committed on January 23, 1973, March 14, 1973, and November 11, 1974 in the Southern District of Texas; and Docket No. *CR-3-76-026*—he received a ten year sentence, to run consecutive to the other sentences, for an armed bank robbery committed on September 4, 1974. He was also convicted on June 10, 1976 in the 196th Judicial District Court, Hunt County, Texas for aggravated robbery. He received a five to twenty five year sentence in the Texas Department of Corrections (now the Texas Department of Criminal Justice—Institutional Division), to be served consecutive to the federal sentences. The bank robbery that was the basis for that conviction was the September 17, 1974 robbery for which he was sentenced federally in Docket No. *CR-3-75-420*.

The issue of criminal history category calculation and career offender status hinge on interpretation of the same language in the Sentencing Guidelines. However, the United States will treat them separately herein for the Court's (and the United States') convenience.

a. *Criminal History Category Calculation*

The Probation Department assessed three points for the conviction in *CR-3-75-420* but did not assess points for the convictions in *CR-3-76-025* or *CR-3-76-026*, "as [these sentences were] imposed . . . on the same date as [*CR-3-75-420*], and [are] considered . . . related case[s] for guideline computations." See paragraph 104 of the presentence report.

As the Court is aware, § 4A1.1 of the Sentencing Guidelines is the relevant provision regarding criminal history

category calculations. That section provides in pertinent part as follows:

> The total points from items (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.
>
> (a) Add 3 points for each *prior sentence* of imprisonment exceeding one year and one month. (emphasis added)

Prior sentence is defined in § 4A1.2(a)(1) of the Sentencing Guidelines as "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense." However, § 4A1.2(a)(2) provides that:

> Prior sentences imposed in *unrelated cases* are to be counted separately. Prior sentences imposed in *related cases* are to be treated as one sentence for purposes of the criminal history. (emphasis added)

Application Note 3 to § 4A1.2 defines *related cases* as follows:

> *Related Cases.* Cases are considered related if they (1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing. The court should be aware that there may be instances in which this definition is overly broad and will result in a criminal history score that underrepresents the seriousness of the defendant's criminal history, and the danger he presents to the public. For example, if the defendant commits a number of offenses on independent occasions separated by arrest, and the resulting criminal cases are consolidated and result in a combined sentence of eight years, counting merely three points for this factor will not adequately reflect either seriousness of the defendant's criminal history or the frequency with which he commits crimes. In such circumstances, the court should consider whether departure is warranted. *See* § 4A1.3.

Presumably, although the presentence report does not specifically so state, the basis for the Probation Department's decision is the language in Application Note 3 to § 4A1.2 which states that cases are related if they are consolidated for sentencing (i.e., Mr. Deal's convictions/cases are related because he was sentenced on the same day by Judge Porter for all of the offenses).

The issue is: what does "cases are considered related if they . . . were consolidated for sentencing" actually mean? The Probation Department's decision not to assign criminal history points for the other convictions indicates that it interprets that language to mean that when the sentences for different cases are imposed on the same day/at the same proceeding, the cases are considered consolidated for sentencing and, therefore, related. The United States disagrees. This interpretation defeats one of the goals of the Sentencing Guidelines:

> The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant . . . has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions . . . .

Title 28, United States Code, Section 994(i).

It also appears to conflict with the Fifth Circuit's decisions in *United States v. Flores* (panel consisting of Judges Wisdom, King, and Williams), *United States v. Paulk*, 917 F.2d 879 (5th Cir. 1990), (panel consisting of Judges Clark, Reavley, and King) and *United States v. Metcalf*, 898 F.2d 43 (5th Cir. 1990) (panel consisting of Judges King, Garwood, and Smith).

In *United States v. Flores*, the defendant had six prior burglary convictions. The court examined the meaning of

"related cases," albeit in the context of determining his career offender status. (The meaning of "related cases" is the critical determination for purposes of criminal history category calculation too, as both criminal history category calculation and career offender status depend on that determination.) Two of those robberies were consolidated for trial and three others were also consolidated for trial, for a total of three trials. The court states that all six cases were consolidated for sentencing and that the six sentences ran concurrently, but it appears from the court's description that three judges imposed three sentences, which ran concurrently. Thus, the Fifth Circuit indicates that Flores' argument was: the convictions were consolidated for sentencing because the six sentences ran concurrently. The court reasoned that "[s]imply because two convictions have concurrent sentences does not mean that the crimes are "related" under Part A." *United States v. Flores*, 875 F.2d at 1114. The court states that:

> Mere concurrent sentences are not enough to defeat the policy of the Guidelines:
>
> > "The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant—(1) has a history of two or more prior federal, state, or local felony convictions for offenses committed *on different occasions* . . . ." 28 U.S.C. § 944(i) (emphasis added).

Id. The Fifth Circuit looked at the underlying reality of the sentences and stated that "[w]hile there may or not have been six separate sentencing proceedings, there were at least three, and two were all that were needed under the definition of a career offender." *Id.*

In *United States v. Paulk*, the Fifth Circuit expands this reasoning. In that case, the defendant was sentenced, for his two prior convictions, on the same day and the sentences ran concurrently. The defendant argued that

the court should have treated these offenses as related, for purposes of criminal history category calculation, which it did not. The Fifth Circuit dismissed the defendant's argument:

> The convictions in question were the result of two separate criminal acts; possession of a controlled substances in 1984 and possession of a controlled substance in 1985. Thomas does not allege that the two convictions are factually related. Simply because sentences run concurrently and were imposed on the same day does not require the sentence to be consolidated for guideline purposes absent a showing of a close factual relationship between the convictions. *United States v. Flores*, 875 F.2d 1110 (5th Cir. 1989). The district court's computation of Thomas' criminal history score was not error.

United States v. Paulk, 917 F.2d at 884. (See also *United States v. Metcalf*, 898 F.2d at 46, wherein the court holds similarly under very similar facts.)

These three cases argue against the Probation Department's interpretation and provide a basis for the assessment of criminal history points for the defendant's prior convictions. The defendant was sentenced for all five robberies on the same day, February 20, 1976. The sentences for four of the robberies (one robbery, *CR-3-75-420*, and three robberies, *CR-3-76-025*) ran concurrently; the sentence for the other robbery (*CR-3-76-026*) ran consecutive to the other four. Furthermore, each of the five robberies took place on a different day.

The real issue is how this Court is going to interpret the language: "cases are considered related if they . . . were consolidated for sentencing." It seems clear that the Fifth Circuit is not inclined to allow a literal reading of the definition of "related cases" to defeat the underlying policy of the Guidelines. However, the Fifth Circuit has made it difficult to envision a circumstance where "cases

were consolidated for sentencing" and are, therefore, related. In other words, if "cases are consolidated for sentencing" does *not* mean concurrent sentences and, further, does not mean concurrent sentences imposed in the same sentencing proceeding, when are cases consolidated for sentencing?

In *United States v. Flores*, the court looked to the fact that there were three sentencing proceedings and to the policies behind the Sentencing Guidelines, albeit in the context of a decision about career offender status. The fact that the sentences ran concurrently was not determinative, so cases are not consolidated just because the sentences imposed in those cases run concurrently.

In *United States v. Paulk*, the court states that the fact that the sentences ran concurrently and were imposed on the same day does not mean that the cases were consolidated for sentencing, thereby shutting off what appeared to be the crack in the door from *United States v. Flores*, namely, whether there was more than one sentencing proceeding. The court focused on the absence of any factual connection between the two convictions in finding that the cases were not related. The court in *United States v. Metcalf* did the same thing.

As stated before, as a result of these three cases, it is difficult to imagine when two cases are "consolidated for sentencing" without defeating the policy of the Sentencing Guidelines set forth in Title 28, United States Code, Section 994(i). Perhaps cases are consolidated for sentencing when the sentences run concurrently and are imposed at one proceeding, and when the underlying offenses are factually related. This seems to be the implication in both *Paulk* and *Metcalf*, which emphasize the importance of a factual relationship between the offenses giving rise to the convictions. (There is some disagreement between the circuits on this issue. See, for example, *United States v. Gross*, 897 F.2d 414 (9th Cir. 1990) wherein the Ninth Circuit ignores Application Note 3 in

holding that a single sentencing proceeding and concurrent sentences did not make cases "related," and *United States v. Davis*, 922 F.2d 1385 (9th Cir. 1991) wherein a different panel of the Ninth Circuit came to the same conclusion as the Fifth Circuit in *Paulk* and *Metcalf*. Or *United States v. Bishop*, 921 F.2d 1069 (10th Cir. 1990) wherein the court upheld the district court's upward departure in accordance with §§ 4A1.2 and 4A1.3 of the Sentencing Guidelines because his three prior felonies were all "consolidated for sentencing," i.e., sentences imposed during the same sentencing proceeding but no criminal history points were assessed. Or *United States v. Delvecchio*, 920 F.2d 810, 812 (11th Cir. 1991) wherein the court held that cases consolidated pursuant to Rule 20 "was the type of consolidation the guidelines contemplated" and so no criminal history points were assessed.)

In any event, it appears that Congress was instructing the Sentencing Commission to develop sentencing guidelines that punish criminals with significant criminal histories—"two or more prior Federal, State, or local felony convictions for offenses committed on different occasions" —more severely than those with one or no prior convictions. Unfortunately, the Sentencing Commission did not choose its words as carefully as it might have with regard to the language at issue here. It would have been clearer if the Commission had used language like "cases are considered related if the sentences imposed run concurrently" or "cases are considered related if sentences are imposed at one sentencing proceeding and if those sentences run concurrently," although such language would probably give rise to a different set of problems. Congress' intent, as best one can glean it from the language in Section 994(i), is to punish criminals with two or more offenses committed on different occasions. Thus, the Fifth Circuit's interpretations appear to be an attempt to implement Congressional intent in the context of the relevant Sentencing Guideline provision, rather than merely to interpret the Sentencing Guidelines lan-

guage. The appropriateness of this is difficult to assess because the Sentencing Commission and, consequently, the Sentencing Guidelines are such unique creatures. Of course, the Sentencing Commission can address the issue in its next revision of the Sentencing Guidelines, but that does not affect the decision before the Court in the instant case. Perhaps the Sentencing Commission was aware that the language at issue herein was problematic and, therefore, included the cautionary language after the first sentence of Application Note 3 to § 4A1.2 (quoted at pp. 3-4 supra). And, perhaps, upward departure, rather than criminal history point assessment or career offender categorization, is the appropriate remedy for the issues raised, even though the Fifth Circuit does not seem to think so.

The Probation Department indicates in the presentence report that 105 years, to run consecutive to any sentence for the armed robberies, is the appropriate sentence for the six 18 USC 924(c) counts of which the defendant was convicted. The United States agrees. And while the severity of this portion of the defendant's sentence appears to nullify the importance of the issues addressed in these Objections, appearances can be deceiving.

Counsel for the defendant has indicated her intention to appeal the 105 year portion of the sentence, if the Court imposes that sentence. The United States maintains that the Court has no discretion, as Title 18, United States Code, Section 924(c) mandates punishment at five years for the first conviction and twenty years for second or subsequent conviction and further requires that the sentences run consecutive to one another and any other sentence for the underlying offenses. There is not a wealth of cases interpretting "second or subsequent convictions" but the language is not ambiguous, as the court stated in *United States v. Rawlings*, 821 F.2d 1543, 1545 (11th Cir. 1987) wherein the court held that "appellant's second conviction under § 924(c), even though in the same indictment as his first conviction, legitimately triggers the enhancement provision." However, should the Fifth Circuit come to a different conclusion, then the issues raised herein become very important.

Clearly, Mr. Deal's criminal history category calculation does not accurately reflect his criminal history in the context of Section 994(i) and the two Fifth Circuit cases discussed. Based on those two cases, points should be assessed for all five prior convictions, as none are factually related. Also, neither the fact that the sentences in four ran concurrently, nor the fact that all sentences were imposed in one proceeding, is determinative.

The defendant also did not receive criminal history points for the state conviction imposed on June 10, 1976. The basis for this decision not to assess points is also Application Note 3. See Paragraph 114 of the presentence report. However, discussion of this issue is more pertinent to the career offender status determination and so is addressed below.

b. *Career Offender Status*

The defendant, Thomas Lee Deal, is more than 18 years of age, the instant offense of conviction is a crime of violence, and the defendant has at least two prior felony convictions of crimes of violence. Therefore, he is a career offender and his offense level should be 34, rather than 30. See § 4B1.1 of the Sentencing Guidelines.

The issue is whether the defendant's prior convictions constitute "two prior felony convictions" under the definition in § 4B1.2 of the Sentencing Guidelines. That section states that:

> The term "two prior felony conviction" means (A) the defendant committed the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense . . . and (B), the sentences for at least two

> of the aforementioned felony convictions are counted separately under the provisions of Part A of this Chapter.

Bank robbery is a crime of violence. Again, § 4A1.2(a)(2), the relevant provision of Part A, provides as follows:

> Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of the criminal history.

And, again, Application Note 3 to § 4A1.2 defines related cases as follows:

> *Related Cases.* Cases are considered related if they (1) occurred on a single occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing. The court should be aware that there may be instances in which this definition is overy broad and will result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger he presents to the public. For example, if the defendant commits a number of offenses on independent occasions separated by arrest, and the resulting criminal cases are consolidated and result in a combined sentence of eight years, counting merely three points for this factor will not adequately reflect either seriousness of the defendant's criminal history or the frequency with which he commits crimes. In such circumstances, the court should consider whether departure is warranted. *See* § 4A1.3.

Thus, the question is whether the fact that the robbery that was the basis of the state conviction was also one of the robberies for which he was convicted federally (*CR-3-75-420*) means that the two cases "occurred on a single occasion" and, therefore, are related. If so, the defendant will not be categorized as a career offender. This is the position taken by the Probation Department

in the presentence report. See paragraph 114 of the presentence report.

The United States maintains that these two convictions are "two prior felony convictions." The position that the state sentence is related to the federal sentence because the robbery that is the basis of the state sentence is the same robbery as the one in *CR-3-75-420* requires an overly technical reading of the definitions and defeats the above-referenced goal of the Sentencing Guidelines:

> The Commission shall assure that the guidelines specify a sentence to a substantial term of imprisonment for categories of defendants in which the defendant . . . has a history of two or more prior Federal, State, or local felony convictions for offenses committed on different occasions. . . .

Title 28, United States Code, Section 994(i).

The Fifth Circuit did not address this issue in *United States v. Flores*, *United States v. Paulk*, or *United States v. Metcalf* and the Assistant United States Attorney handling this case has not been able to find any cases addressing the issue. However, it seems clear that the Probation Department's interpretation, while understandable, does not give adequate consideration to the intent of Congress.

Thomas Lee Deal was convicted in federal court on February 20, 1976 for five bank robberies; he was convicted on June 10, 1976 in state court for one of those robberies (i.e., he was convicted twice for the same robbery by different sovereigns). "Cases are considered related if they . . . occurred on a single occasion." The state case and *CR-3-75-420* occurred on a single occasion, but the state case and the other four robberies for which he was convicted in federal court did not occur on a single occasion. To allow *CR-3-75-420* to subsume all five robberies for purposes of a determination as to whether the state case and the federal cases are "related" is to put

form ahead of substance. In a slightly different context, the Fifth Circuit has indicated that it is not willing to do this.

II.

Second, the presentence report indicates that Ms. Miller did not see a gun in this robbery. That is not what the evidence at trial indicated. Ms. Miller testified that she saw part of the gun. Again, this error is not Karen Norris' fault. The information appears incorrectly in the agent's report.

Third, the presentence report indicates that the dollar amount stolen in the second robbery (Ameriway Bank on February 23, 1991) was $8,000. Karen Norris indicated that she obtained that information from the indictment and the agent's report. Evidence at trial revealed that the amount stolen was approximately $7,000. The difference does not affect sentencing, according to the Sentencing Guidelines.

Fourth, one of the tellers referred to is Ms. Janice Hollon. Her name appears in the presentence report as Janice Hollow.

Respectfully submitted

RONALD G. WOODS
United States Attorney

By: /s/ D. R. Millard III
D. R. MILLARD III
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
HOUSTON DIVISION

(Caption Omitted in Printing)

STATEMENT CONCERNING PRESENTENCE REPORT AND RESPONSE TO GOVERNMENT'S OBJECTIONS TO PRESENTENCE REPORT

[Filed April 12, 1991]

The defendant, THOMAS LEE DEAL, files these objections to part of the Presentence Investigation Report (PSI) and responses to the government's objections to the PSI:

I.

After a review of the entire PSI, THOMAS LEE DEAL, objects only to the computation of the guideline sentence.

II.

The probation officer has suggested that 105 years is the appropriate sentence for Counts 2, 4, 6, 8, 10 and 12. THOMAS LEE DEAL disagrees and urges the Court to find that thirty years is the appropriate sentence due to the ambiguity of the statute.

III.

The probation officer bases the 105 year sentence on the language of 18 U.S.C. § 924(c) which states that the sentence for second or subsequent convictions is twenty years. It is the defendant's position that the sentence for each count under 18 U.S.C. § 924(c) is five years. *See United States v. Luskin*, 926 F.2d 380 (4th Cir. 1991);

United States v. Fontanilla, 849 F.2d 1257 (9th Cir. 1988). The statute is clearly ambiguous on the meaning of "second or subsequent convictions." If twenty years were the appropriate sentence for convictions in the same indictment, then there would be no need to modify "convictions" with "second or subsequent." Twenty years would be the appropriate sentence in the facts presented herein only if the convictions were received at a later time.

There is virtually no legislative history on this statute and this question has not been presented to the Fifth Circuit Court of Appeals. When facing such a situation and the statute is clearly ambiguous, the court should apply a policy of lenity as the United States Supreme Court instructed in *Simpson v. United States*, 435 U.S. 6 (1978). In that case, the Court stated that " '[t]his policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.' " *Id.* (quoting *Ladner v. United States*, 358 U.S. 169, 178 (1958)).

IV.

The government first objects to the probation officer's criminal history point assessment. The state court conviction for the robbery of the State National Bank in Caddo Mills cannot be counted separately under § 4A1.2 of the Sentencing Guidelines because it is clearly related to the federal court conviction for that very same robbery. There can be no better factual relationship, as the Guidelines call for, than the very same criminal episode. As cited by the government in its objections, the reasoning in *United States v. Paulk*, 917 F.2d 879 (5th Cir. 1990) is clearly applicable. In that case, the court focused on the absence of any factual connection between the two convictions to find that the two cases were not related. Thus, no points should be assessed for the state court conviction in Mr. Deal's case.

The cases referred to in the PSI that arose in the Southern District of Texas and were transferred to the Northern District of Texas pursuant to Rule 20 of the Rules of Criminal Procedure should not be assessed points. Rule 20 consolidation for sentencing falls within § 4A1.2 (a) (2) of the Sentencing Guidelines, which defines related cases as those consolidated for trial or sentencing. *See United States v. Delvecchio*, 920 F.2d 810, 812 (11th Cir. 1991).

The government relies on "gleaning" the intent of Congress from 28 U.S.C. § 994(i). As the government concedes, it is not clear how the Sentencing Commission defines the language "consolidated for sentencing." Again, when the language is ambiguous and congressional intent cannot be determined, the rule of lenity should be applied. *See Simpson, supra.*

V.

The government also objects that Thomas Lee Deal was not assessed career offender status. As the government points out, the issue is whether the defendant's prior convictions constitute "two prior felony convictions" under the definition in § 4B1.2 of the Sentencing Guidelines. Section 4B1.2 requires that the two prior felony convictions must have been assessed sentences that are counted separately under Part A. For the reasoning set out in paragraph IV, Mr. Deal does not have the requisite two prior felony convictions and, therefore, cannot be categorized as a career offender under § 4B1.1 of the Sentencing Guidelines.

Respectfully submitted,

ROLAND E. DAHLIN II
Federal Public Defender
Southern District of Texas
Admissions ID No. 3198

/s/ Dola Young
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Asst. Federal Public Defender
Attorney in Charge
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

(Caption Omitted in Printing)

(TRANSCRIPT OF PROCEEDINGS OF APRIL 12, 1991) (pp. 2-5)

* * * *

[2] THE COURT: I call for sentencing at this time: 90-315-S, United States versus Thomas Lee Deal.

MR. MILLARD: Duke Millard, for the United States.

MS. YOUNG: Dola Young, for Mr. Deal.

THE COURT: And this is Mr. Deal.

Mr. Deal, have you gone over the Pre-Sentence Report?

THE DEFENDANT: Yes, sir.

THE COURT: You are thoroughly familiar with what's in it?

THE DEFENDANT: Yes, sir.

THE COURT: I have the government's objections to the Pre-Sentence Report as well as Ms. Young's objections. If there is anything you would like to add, counsel, I would be glad to hear it at this time.

What says the government?

MR. MILLARD: Well, Your Honor, I don't know exactly how the Court intends to proceed, I don't know whether the Court wants me to go through my entire objections. There's nothing in addition, other than what's in the objections.

THE COURT: All right. And Ms. Young.

MS. YOUNG: Your Honor, I would just like to make the point regarding the enhancement on the second or subsequent convictions. The whole point of enhancement is

to increase the sentence or provide extra punishment for those who, I guess [3] who did not learn their lesson from serving time the first time. And the whole purpose is defeated by sentencing, in this case, by a 105 years. Because Mr. Deal never had an opportunity to serve the first sentence by which he would be given an opportunity before being convicted a second time in receiving the enhanced punishment.

THE COURT: All right. Is there anything else you would like to tell me in his behalf?

MS. YOUNG: I would like to point out to the Court or perhaps refresh the Court's memory at the time of the suppression hearing when David Wells testified, one of the comments that he made was that Mr. Deal's claim to fame was that he had never hurt anyone. And I think that that goes to, while these are violent crimes, that says a lot about Mr. Deal's character. And that's it.

THE COURT: Mr. Deal, anything you would like to tell me?

THE DEFENDANT: No, sir, not really.

THE COURT: I guess I will continue sitting on this bench for the rest of my career never understanding how a man like you could get into what you got into.

I have analyzed the enhancement statute as carefully as I can and it seems to me perfectly obvious what Congress is telling us is that we must consider each of these firearms offenses as separate offenses. Mr. Deal, I don't have [4] much choice in this case.

On Counts 1, 3, 5, 7, 9, and 11, I sentence you to 168 months on each count, to be served concurrently.

On Count 13, I sentence you to 120 months, concurrent to the counts in 1, 3, 5, 7, 9, and 11.

On Count 2, I sentence you to five years to serve consecutive to the counts in 1, 3, 5, 7, 9, 11, and 13.

On Counts 4, 6, 8, 9—I'm sorry, 10 and 12, that's 4, 6, 8, 10, and 12, I sentence you to 20 years to serve on each count, to run consecutive to each other and to the Counts 1, 2, 3, 5, 7, 9, 11, and 13.

I will say this, if I had not read the statute the way I did, I would have been compelled, on the facts of this situation, to depart upward. Your prior convictions for five separate acts of bank robbery, abscounding from two separate parole jurisdictions, committing seven armed bank robberies where, admittedly, no one was hurt, but someone could have been killed, it is important not only that I punish you but that I incapacitate you.

Your attempt to escape from custody makes this a mandatory case.

While it seems unnecessarily redundant, I'm going to add five years of supervised release on Counts 1, 5, 7, 9, and 11 and three years of supervised release on 2, 3, 4, 6, 8, 10, 12, and 13, the terms all to run concurrent with each other [5] for a total period of five years.

Should you ever serve a period of supervised release, you will abide by the standard conditions.

I'm not going to order restitution in this case, although it's certainly appropriate, because there's no likelihood of your paying it, nor is there any likelihood of your paying a fine.

I impose a special assessment of $50 on each of the counts, for a total of $650.

I overruled the government's objections and the objections of defense counsel and adopt the Pre-Sentence Report as written.

Thank you very much.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

(Caption Omitted in Printing)

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

[Entered April 29, 1991]

Dola Young, Defendant's Attorney

THE DEFENDANT:

☒ was found guilty on count(s) 1-13 on January 23, 1991 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18:2113(a) & (d)	Robbing a bank by use of force at gunpoint	1-24-90 3- 1-90 3- 5-90 3-13-90 4-12-90	1, 5, 7, 9, 11
18:924(c)	Use and possession of a firearm during or in relation to a crime of violence	1-24-90 2-23-90 3- 1-90 3- 5-90 3-13-90 4-12-90	2, 4, 6, 8, 10, 12
18:2113(a)	Robbing a bank	2-23-90	3
18:922(g)	Unlawful receipt and possession of a firearm	4-12-90	13

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ It is ordered that the defendant shall pay a special assessment of $650.00, for count(s) 1-13, which shall be due ☒ immediately ☐ as follows:

Clerk, United States District Court, Attention: Finance, P.O. Box 61010, Houston, Texas 77208.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid: UNITED STATES ATTORNEY'S OFFICE, Financial Litigation Unit, P. O. Box 61129, Houston, Texas 77208.

Defendant's Soc. Sec. No.:
458-70-6892

Defendant's Date of Birth:
09-23-46

Defendant's Mailing Address:
Harris County Jail
1301 Franklin
Houston, Texas 77002

Defendant's Residence Address:
Harris County Jail
1301 Franklin
Houston, Texas 77002

April 12, 1991
Date of Imposition of Sentence

/s/ Norman W. Black
Signature of Judicial Officer

NORMAN W. BLACK
United States District Judge
Name & Title of Judicial Officer

4-26-91
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ONE HUNDRED SIXTY-EIGHT (168) MONTHS on Counts 1, 3, 5, 7, 9, & 11, each count to be served concurrent to each other;

ONE HUNDRED TWENTY (120) MONTHS on Count 13, to be served concurrent with Counts 1, 3, 5, 7, 9, & 11;

FIVE (5) YEARS on Count 2, to be served consecutive to Counts 1, 3, 5, 7, 9, 11, & 13:

TWENTY (20) YEARS on each of Counts 4, 6, 8, 10 and 12, to be served consecutive to each other and to Counts 1, 2, 3, 5, 7, 9, 11, and 13.

☒ The court makes the following recommendations to the Bureau of Prisons: None.

☒ The defendant is remanded to the custody of the United States marshal.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2407

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

THOMAS LEE DEAL,
Defendant-Appellant.

Appeal from the United District Court
for the Southern District of Texas

(February 7, 1992)
[Filed March 5, 1992]

Before REAVLEY, HIGGINBOTHAM and DeMOSS, Circuit Judges.

DeMoss, Circuit Judge:

Thomas Lee Deal ("Deal") went on a crime spree in the Houston, Texas area, committing six armed robberies of various banks during the period of January through April 1990. In each robbery he used a gun. When caught, he was indicted in a 13 count superseding indictment with six counts of bank robbery involving offenses under 18 U.S.C. § 2113(a) and (d); six counts involving use of a deadly weapon during a crime of violence in violation of 18 U.S.C. § 924(c); and one count of being a felon in

possession of a firearm in violation of 18 U.S.C. § 922(g). The jury found Deal guilty on all counts. The probation office considered the six counts of 18 U.S.C. § 924(c) as six separate convictions and applied the statutory enhancement which raises the penalty from five years to twenty years per count for each of the "second or subsequent" convictions. This resulted in a sentence recommendation of 105 years on the § 924(c) counts and as Congress mandated, these sentences were to run consecutively. Deal made the proper objections to the trial court, but the district judge sentenced in accordance with the probation officer's recommendations.

Deal appealed on the single grounds of whether or not the District Court imposed the proper sentence in connection with the counts of conviction under 18 U.S.C. § 924(c). The issue raised by Deal is a question of law; and the standard of review is therefore *de novo. Walter v. Torres*, 917 F.2d 1379, 1383 (5th Cir. 1990). This is the first occasion on which this Court has had to address this question.

The pertinent part of 18 U.S.C. § 924(c) provides:

> Whoever, during and in relation to any crime of violence . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . ., be sentenced to imprisonment for five years, ... *In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years,* . . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence . . . in which the firearm was used or carried. (emphasis added)

Deal urges that Congress' use of the disjunctive "second or subsequent" to modify "conviction" in § 924(c) creates an ambiguity because the meaning of "second" is subsumed into the meaning of "subsequent." Deal argues that under the plain meaning of "subsequent", the provision should be interpreted to require that an offender be convicted under *separate* indictments before the enhancement provision could apply. Since he was convicted for several offenses charged in the same indictment, Deal argues that he was not subject to a "subsequent conviction"; and, therefore, he should not have received an enhanced sentence.

The government contends that Congress included, "second or subsequent conviction" to cover both the situation where a defendant is convicted of more than one § 924(c) offense in one indictment and the situation where the separate offenses are charged in separate indictments. The government argues that Congress wisely put this language in to preclude prosecutors from having discretion to control the imposition of the enhancement by the manner of charging the offenses.

If this were a matter of first impression before any Circuit Court, we might be inclined to explore the controversy further. However, the Eleventh, Eighth, Sixth, Seventh and Fourth Circuits have previously determined that a "second or subsequent conviction" under 18 U.S.C. § 924(c) can result from the same indictment as the first conviction under § 924(c). *See, United States v. Rawlings*, 821 F.2d 1543, 1545 (11th Cir.), *cert. denied*, 484 U.S. 979 (1987); *United States v. Hamblin*, 911 F.2d 551, 555 (11th Cir. 1990), *cert. denied sub. nom., Jones v. United States*, —— U.S. ——, 111 S.Ct. 2241 (1991); *United States v. Foote*, 898 F.2d 659, 668-69 (8th Cir.), *cert. denied sub. nom., Thompson v. United States*, —— U.S. ——, 111 S.Ct. 112 and *Williams v. United States*, —— U.S. ——, 111 S.Ct. 342 (1990); *United States v. Nabors*, 901 F.2d 1351, 1358-59 (6th Cir.), *cert. denied*,

—— U.S. ——, 111 S.Ct. 192 (1990); *United States v. Bennett*, 908 F.3d 189, 194-95 (7th Cir.) *cert. denied*, —— U.S. ——, 111 S.Ct. 534 (1990); *United States v. Luskin*, 926 F.2d 372, 375 (4th Cir.), *cert. denied*, —— U.S. 112 S.Ct. 68 (1991).

In the present case, each of counts 2, 4, 6, 8, 10, and 12, which were the counts alleging violations of § 924(c), related to bank robberies committed on different days involving different banks and different times. We hold, therefore, that the District Court correctly imposed the proper sentence in this case, including the enhancements resulting from "second or subsequent" convictions under 18 U.S.C. § 924(c).

For the foregoing reasons, the judgment is AFFIRMED.

SUPREME COURT OF THE UNITED STATES

No. 91-8199

THOMAS LEE DEAL,
Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 5, 1992